Cote Bros. Bakery, Inc. *and* Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO. Cases 1-CA-17666 and 1-CA-17762

December 17, 1981

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND HUNTER

On July 9, 1981, Administrative Law Judge Robert W. Leiner issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, a motion to reopen the record, and a motion to dismiss.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Cote Bros. Bakery, Inc., Manchester, New Hampshire, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT threaten to discharge employees who engaged in a lawful strike by telling them that they are "through" if they continue to engage in the strike.

WE WILL NOT insist, to the point of bargaining impasse, on nonmandatory subjects of bargaining, including an amnesty for all our employees who pass through or work behind the Union's picket line.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively in good faith with Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, in the below-described unit with respect to wages, hours, and other terms and conditions of employment and embody any understanding reached in a signed agreement:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees, and supervisors as defined in the Act.

WE WILL, upon their unconditional offer to return to work, reinstate the strikers to their old jobs, dismissing, if necessary, any replacements hired in their place, except where such replacements occurred before June 24, 1980, and make them whole for any loss of earnings that they may incur, with interest. Striking employees who were premanently replaced or whose jobs were abolished before June 24, 1980, shall be offered jobs when and if the pre-

[1] Respondent moves to reopen the record to adduce evidence that its assets have been foreclosed and are being liquidated, and that an involuntary bankruptcy petition has been filed against the Company. Inasmuch as this evidence if established would not in any way affect the findings and result herein, see Sec. 102.48(d)(1) of the Board's Rules and Regulations, Series 8, as amended, and inasmuch as such matters are more appropriately handled at the compliance stage of this proceeding, we decline to grant Respondent's motion. For the reasons discussed by the Administrative Law Judge in fn. 10 of his Decision, we also deny Respondent's motion to dismiss.

[2] Respondent has implicitly excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In agreeing with the Administrative Law Judge that Respondent violated Sec. 8(a)(5) of the Act, we find it unnecessary to pass upon the alternative theory (which he characterized as "legally unnecessary" to decide) which he discussed in pars. 9 and 10 of the section of his Decision entitled "Discussion and conclusions" and in the section entitled "The Strike as of June 24, 1980."

We note that the Administrative Law Judge inadvertently miscited *Nelson Filter, a Division of Nelson Industries, Inc.* The correct citation is 255 NLRB 1080 (1981).

Finally, we shall conform the Administrative Law Judge's notice with his recommended Order.

manent replacements leave, or when positions become available for which they are qualified.

COTE BROS. BAKERY, INC.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge: The charge in Case 1-CA-17666 was filed and served on July 15, 1980, by Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, herein called the Union or Local 348, upon Cote Bros. Bakery, Inc., herein called Respondent. The charge in Case 1-CA-17762 was filed and served by the Union on August 19, 1980, on Respondent. The Regional Director for Region 1 of the National Labor Relations Board, herein called the Board, acting for and on behalf of the Board's General Counsel, issued a complaint and notice of hearing on October 15, 1980. Pursuant to the second charge herein, the aforesaid Regional Director, on January 25, 1981, issued an order consolidating cases and amended complaint and notice of hearing. Respondent filed timely answers to both the original and the amended complaint on October 23, 1980, and January 15, 1981, respectively. The consolidated amended complaint, herein referred to as the complaint, alleges that Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act, as amended, by virtue of various alleged threats to employees on June 10 and 11, 1980, after the commencement of a strike and by virtue of a refusal to bargain by Respondent as shown by certain acts it committed during collective-bargaining negotiations occurring on June 24, 1980. The complaint, as modified at the hearing, also alleges that the strike, which commenced on or about June 10, 1980, was converted into an unfair labor practice strike on or about June 24, 1980. In its answers Respondent admits various allegations of the complaint but denies the commission of any unfair labor practices.

Pursuant to notice, a hearing was held on the issues raised by the pleadings in Boston, Massachusetts, on May 13 and 14, 1981. After close of receipt of the evidence, the parties waived oral argument and thereafter filed timely briefs which have been duly considered.

Upon the entire record in this case, including the briefs, and upon my observation of the witnesses as they testified, I hereby make the following:

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that, at all material times, Respondent, a New Hampshire corporation, maintained its office and principal place of business at 87 Elm Street, Manchester, New Hampshire, where it has been, and is now, engaged in the manufacture, sale, and distribution of bread and rolls, annually shipping products valued in excess of $50,000 directly to points outside the State of New Hampshire, and annually receiving products valued in excess of $50,000 directly from points located outside the State of New Hampshire. Respondent, at all material times, has been, and is, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

At the hearing, the General Counsel and Respondent substantially amended their respective pleadings: The General Counsel withdrew various allegations of independent violations of Section 8(a)(1) of the Act. Respondent admitted that it and the Union were parties to a collective-bargaining agreement effective from May 4, 1977, through May 7, 1979, encompassing the following unit:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees and supervisors as defined in the Act.

Respondent, in addition, also admitted that the above unit is one appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and that since on or about 1951 the Union has been the designated exclusive collective-bargaining representative of Respondent's employees in the above unit[1] and had been recognized as such by Respondent for purposes of Section 9(b) of the Act until on or about June 30, 1980.

The parties agree that the Union engaged in an economic strike commencing at or about noon, June 10, 1980, but the General Counsel alleges, and Respondent denies, that the strike became an unfair labor practice strike on June 24, 1980. There is no dispute that the strike continued through the time of the hearing herein.

It is admitted by the General Counsel that Cote Bros. Bakery has been in substantial financial difficulty at least since 1979. At all material times from the end of 1979 until June 1980, Respondent maintained an $800,000 debt to the Indian Head Bank, Nashua, New Hampshire, herein called the Bank. By June 1980, Respondent had defaulted on repaying this loan and was insolvent in excess of $323,000. Furthermore, for at least 6 months prior to June 1980, Respondent had defaulted on its obligation to pay contributions to the Union's pension fund under an expired collective-bargaining agreement (G.C. Exh. 2; expired May 7, 1979), which agreement had been orally extended by the parties subsequent to its expiration. Lastly, Respondent had been in default of paying

[1] The actual collective-bargaining representative prior to June 1, 1979, was another local of the same International. On June 1, 1979, that local was merged into Local 348.

the interest on its bank debt for at least that same 6-month period. Negotiations regarding a new collective-bargaining agreement occurred from time to time since expiration of the old agreement.

By April 1979, the Bank had employed a financial consultant, Charles R. Hefford, to review and evaluate Respondent's financial condition and prospects. In a report to the Bank (not presented at this hearing), Hefford advised the Bank that, notwithstanding Respondent's defaults, it need not at that time take over Respondent's assets (apparently pursuant to its right as a creditor) and that Respondent could continue as a viable business provided various internal changes and economies were instituted. Thereafter, Hefford became a financial consultant to Respondent.[2]

Sometime no later than May 1980, in bargaining with Respondent, the Union demanded an economic package which consisted of a 92-1/2-cent-per-hour increase. The Bank authorized Respondent to offer no higher than a total of 30 cents per hour: 17-1/2 cents per hour for maintenance of existing benefits; and a 12-1/2-cent-per-hour wage increase. Respondent made this cnunteroffer in May 1980.

In support of its continued claim of financial inability to pay higher wages, it is undisputed that as early as October 1979 Respondent offered, and the Union agreed, to have the Union inspect its books and records. The Union did so on or about October 3, 1979. I further find that, at all material times thereafter, Respondent has offered to prove its continued financial inability to pay greater economic increases.

On June 10, 1980, the parties held a collective-bargaining session in which the Union demanded 92-1/2 cents per hour as a total economic package. Respondent offered 30 cents per hour and offered to prove, again, its inability to make a more fruitful economic offer. The Union nevertheless insisted on its demand of 92-1/2 cents per hour and engaged in an economic strike commencing at or about noon on that day. At noon, a picket line was authorized by the Union's officials, including Kenneth McLellan, an International vice president of the Union.

At the start of the June 10 strike, Bruce Ullrich, general manager of Respondent, telephoned Louis Murray, a senior vice president and chief loan officer of the Bank, for help and counsel. He told Murray that the Union apparently did not believe Respondent's poor financial position and that perhaps Murray and the Bank could convince the Union that Respondent was unable to pay more.

Within a half hour, Murray, together with the Bank's attorney and another bank official, arrived at Respondent's bakery, met with Ullrich and asked Ullrich what they could do. They decided that the Bank, as a "neutral third party," should speak to the Union's officials in the absence of Ullrich (or any other of Respondent's supervisors) and denonstrate to them Respondent's financial difficulties. Murray also credibly testified that, at that time, he considered it to be a prudent act, in protecting the Bank's interest, to activate the legal machinery to take over Respondent's assets but, pursuant to a telephone call from Respondent's attorney, he acceded to the request not to do so for at least 1 day.

Louis Murray testified that he agreed with his attorney (Horton) and the other bank official (O'Brian) that there would be no negotiations by the Bank with any union people and no involvement in Respondent's union affairs. Their only function was to demonstrate Respondent's unhappy financial position to the Union. Thus, at their request, Ullrich went to the picket line and returned with several union business agents and officers, including McLellan and Local 348 Business Manager David Murray, as well as several picketing employees. Ullrich left them. With the union business agents as well as the striking employees standing in Respondent's loading area, a conversation ensued between the parties. Local 348 Business Manager David Murray testified that Bank Vice President Louis Murray said that if a strike continued for 2 days Respondent would "fold." He said that Bank Official O'Brian added that the Bank had given Respondent the 30-cent-per-hour economic package and, if the Union did not believe Respondent's financial condition, the Union could inspect the books. David Murray said that he answered that the Union knew of Respondent's financial problems; the Union had given Respondent a 1-year extension without increases and believed that they already had an agreement for a zero increase for the first year of a new contract and 75 cents per hour for the second year. O'Brian then allegedly answered that the Bank had told Respondent that it could offer only 30 cents per hour and was telling the Union the same thing. The Union said that the strike would continue.

Frank Volpe, a Local 348 business agent, testified that the bank officials not only said that Respondent would have greater financial problems if the strike continued, but the Bank would foreclose its loans to Respondent and sell Respondent's equipment and everybody would lose their jobs.

Louis Murray, who on June 10 caused O'Brian, to serve Respondent with a demand for payment of the defaulted loan, testified that he told the union officials and the employees that the Bank was there not to negotiate or get involved between the parties but merely as an independent third party; that the Bank's interest concerned whether to foreclose its loan and liquidate Respondent's business; that Respondent was $361,000 into insolvency; that "any slowdown of revenue coming in could have a fatal impact on the Company"; and that the Union should "draw its own conclusions as to what would happen with the continuation of the strike." He denied telling them that a continuation of the strike would force Respondent to close or even mentioning 30 cents per hour or anything with regard to negotiations. He testified that he told the employees and union officials only that he was there as a third party giving the Bank's point of view with regard to Respondent's financial condition.

B. *Louis Murray's Statements as Alleged Violations of Section 8(a)(1)*

The complaint alleges that Respondent, by the Bank's officials as its agents, told the employees that the Bank

[2] There is no suggestion that he remained an agent of the bank.

would foreclose and the employees would lose their jobs if the employees continued to strike. Respondent contests this agency status, but no finding on the point is necessary since I dispose of the Bank's action on the merits.[3] The General Counsel did not call McLellan to corroborate the testimony of Volpe and David Murray. Similarly, Respondent called neither its attorney (Horton) nor its agent (O'Brian) to substantiate and corroborate the testimony of Louis Murray.

I resolve the testimonial conflict between the Bank and the union officials as follows. I conclude that Louis Murray did tell the assembled union officers and employees that continuing the strike would cause Respondent such loss of revenue as to cause it to fold, and that the Bank would foreclose the loan, and sell the equipment and everybody would lose their jobs if the strike continued. That is the meaning of his "draw [your] own conclusions remark." I also conclude that Louis Murray's and the other bank officials' statements to the union officials and employees, that a continued strike meant such a loss of revenue as to necessarily cause the Bank to foreclose, Respondent to go out of business, and the employees to lose their jobs, in the presence of the objective financial data known to the Union for at least 6 months, were insulated from any coercive effect as an unlawful "threat" within the meaning of the Act. Thus, such statements, in conjunction with Louis Murray's unchallenged testimony that, in the Bank's interest, it should have immediately taken over and liquidated Respondent's assets and that it contemporaneously presented a demand to Respondent for payment of its defaulted loan (as a legal preliminary to taking over Respondent's assets), were based on clear and open economic data which demonstrated a reasonable belief on the Bank's part that Respondent could not continue in business suffering the anticipated economic losses due to the strike. This is legally far different from an attempt, without objective, supporting economic data, by an employer to coerce employees into giving up their right to strike by a threat to go out of business. The Supreme Court recognized this in *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969). Under *Gissel*, I conclude that Louis Murray's statements concerning Respondent's going out of business ("draw [your] own conclusions") in the face of a loss of revenue due to the strike was a "reasonable prediction based on available facts." *Gissel, supra* at 618. Certainly, there is no evidence of the Bank's insincerity in making these predictions. I therefore recommend that paragraph 8(d), which alleges an independent violation of Section 8(a)(1) of the Act by virtue of the bank officials' June 10 statements to Respondent's striking employees of a threat to go out of business, be dismissed.

C. *Other Alleged 8(a)(1) Violations*

According to the testimony of Scott Tuthill, an employee engaged in the June 10 strike, he met Bruce Ullrich in the bakery parking lot in the afternoon on June 10 while the strike was in progress. He testified that Ullrich approached him and told him that he was trying to get a shift together for that night to continue to work; that if Tuthill wanted to come to work he could; but that if the strike continued, the plant would close permanently. Ullrich denied having any such conversation with Tuthill. I credit Tuthill and discredit Ullrich. I do so on the basis of the specificity of Tuthill's recollection and on the demeanor of the witnesses. I conclude, nevertheless, that Respondent did not violate Section 8(a)(1) of the Act by telling Tuthill, a striking employee, that Respondent would close its plant permanently if the employees continued to strike. I note that, although economic elements were mentioned by Ullrich to Tuthill, the statement was insulated by the then existing facts, above stated. I recommend that this allegation be dismissed.

The only remaining alleged violation of Section 8(a)(1) is in paragraph 8(b) and involves Respondent's vice president, Colette Cote, and a telephone conversation she had with striking employee John Shea in the evening on June 11, 1980. According to Shea, Cote telephoned him at his home and asked him to return to work and he replied that he would not do so without the Union's approval. To this, Shea testified, Colette Cote said that if he did not return that day, "You're through."

Cote could not recall any particular conversation with John Shea, although she testified that she telephoned 30 of the 60 striking employees in order to have them return to work because, as she told them, the Company had decided to operate and was trying to get a shift together. Cote testified that she told all 30 employees whom she telephoned that Respondent was merely trying to start a production line and asked them to return. While she could not recall what Shea answered, she denied telling him, or any other employee, that they were "through" if they did not return to work.

On the basis of his demeanor and the specificity of his testimony, together with the particular lack of recollection of Cote regarding her conversation with him, I credit Shea and conclude that, as alleged, Cote told him that, if he did not return to work that day, he was "through"; and that such statement was a threat of discharge uttered to a striker in violation of Section 8(a)(1) of the Act. This is far different from an objective prognostication of going out of business.

D. *The Alleged 8(a)(5) Violations*

1. The collective-bargaining session of June 17, 1980

Following the June 10 bargaining session which resulted in the strike of that day, the Federal Mediation and Conciliation Service called a further meeting for June 17, 1980. The Union's witnesses, particularly David Murray and Frank Volpe, testified that at Respondent's attorney's (Bennett) request the Union's full committee of employees and union agents selected and worked principally through a subcommittee consisting of Volpe, David Murray, and McLellan (succeeded by Joseph Thibodeau at meetings after June 17). The testimony is in dispute as to whether at this June 17 collective-bargaining session the parties resolved the question of the Union's accept-

[3] Were a finding necessary, I would conclude that Respondent used the bank officials to persuade the Union of Respondent's insolvency and the economic consequences of a continued strike. Within the scope of such activities, they were Respondent's agents.

ance of Respondent's outstanding offer of a 30-cent-per-hour economic package. Contrary to the testimony of Respondent's witnesses Ullrich and Hefford, I credit the particular testimony of Volpe, who testified that the union subcommittee, at that bargaining session, agreed to present the 30-cent-per-hour package to the full committee, that the full committee ultimately agreed to recommend the 30-cent-per-hour package to the membership, and that the subcommittee so notified Respondent.

Further, I conclude, while the ultimate question of whether the subcommittee told Respondent that the Union was going to recommend to the membership the 30-cent-per-hour economic package is not dispositive and while this is not an "acceptance" of Respondent's offer, I also make the subsidiary finding that at the beginning of the meeting (after the Union acknowledged that it knew that Respondent was in deep financial trouble) Respondent initially inquired whether the Union was prepared to submit Respondent's offer to its membership with an affirmative recommendation. While the Union at first said that it would submit the recommendation without comment, it then agreed to meet with the full committee on the matter and submit it to them. It was after this caucusing that the subcommittee returned and, as above noted, told Respondent that the Union would recommend the 30-cent-per-hour package to the membership. I also find that it was Union Vice President McLellan who, before caucusing with the full committee, told Respondent that the Union would submit the 30-cent-per-hour wage package "without recommendation." I conclude that after caucusing the Union notified Respondent that it was prepared to recommend the 30-cent-per-hour economic package to the membership for a vote, and that the vote, in accordance with Respondent's request, would be by secret ballot.

At the time of this June 17 meeting, the strike was in progress for 1 week. During the meeting, and before the Union's caucus to consider acceptance of the economic package, Ullrich told the Union of a number of incidences of strike misconduct affecting some (about 17) employees who had crossed the picket line and worked for Respondent during that week. Ullrich read off a list of allegations of attempted rape, scratching and painting cars, and threats to employees who crossed the picket line. McLellan denied knowledge of the incidents but added that he would pass the word that the members should abstain from violence.

I further find that, after the subcommittee returned and advised Respondent that the Union committee would recommend the 30-cent-per-hour economic package, Respondent (Bennett) said "great" but that the parties still had to resolve the problem of protecting the working employees against any threats or reprisals from the returned strikers. I find, in accordance with Ullrich's testimony, that Bennett and Ullrich told the Union that Respondent sought to protect employees who crossed the picket line and any "new hires." Ullrich and Bennett told the Union of Respondent's concern with the Union's anticipated retaliation against its members who crossed the Union's picket line. David Murray recalled that, when Respondent, through Ullrich and Bennett, demanded a contract provision that there be no reprisals against the employees who crossed the picket line, McLellan said that what Respondent was asking for was against the International constitution; that members had a right to bring charges against other members; and that, in view of the fact that he thought that there was an existing agreement, that Respondent had "doublecrossed" the Union. McLellan recalled that, in addition, he told Bennett that while the Union could not agree to a provision against reprisals against members who crossed the picket line because the members had a right to file charges under the union constitution, the union officers had no interest in taking reprisals against such members. Volpe's testimony corroborates David Murray's and McLellan's credited testimony.

Charles R. Hefford, present at the meeting as Respondent's financial consultant, credibly recalled that, when the Union stated that it could not bind the membership from making charges against the members who crossed the picket line, but that the officers had no interest in taking retaliation, Bennett or Ullrich said that such an assurance from the Union was not sufficient and that Respondent wanted an assurance against retribution or retaliation by the membership. He recalled Ullrich saying that the union officers' assurance, as it stood, was not good enough; and that Respondent needed an agreement against retaliation from any quarter against the employees who passed through the picket line since they were the older, experienced employees needed by Respondent to operate. He recalls that Respondent called them its "key" people. Ullrich recalled that McLellan said he hoped Respondent was not trying to tell him how to run "his Union."

I credit Hefford's testimony that at that point McLellan said that, since there could be no agreement with regard to the issue of retribution or retaliation against members who had crossed the picket line, he would not present Respondent's 30-cent-per-hour economic offer to the membership. At that point, after McLellan said that the members had a constitutional right under the International constitution to file charges against members who crossed the picket line, Bennett asked for a copy of the constitution to see what the members' rights were. McLellan said that he did not have a copy of the constitution with him but would provide Bennett with a copy thereafter, and suggested that Bennett, as a lawyer, might find a way around this problem. A copy of the constitution was subsequently served on Bennett.

Volpe credibly testified, and Ullirch's and Hefford's testimony supports the conclusion, that this June 17 meeting broke up after Bennett said that Respondent could not allow the employees who crossed the picket line to have problems and would have to have an agreement that these "key people" would not be subject to any union retribution either by having them fired by the Union through loss of union membership or through the imposition of heavy union fines which might cause them to quit their employment.

2. The collective-bargaining session of June 24, 1980

The Federal Mediation and Concilation Service called a meeting on June 24. The meeting opened with the me-

diator asking the Union to explain its International constitution and the members' right to file charges against members who crossed the union picket line.

Attorney for Respondent (Bennett) then stated that since he had been provided with the copy of the union constitution between the two meetings, and the Union had rejected a premeeting suggestion that the Union exact a token $25 fine on each member who had crossed through the picket line, the way around the problem of union retaliation was that the Union agree to an "agency shop." Bennett said that an agency shop would require merely the payment of union dues and fees without requiring union membership and that the union members who had crossed the picket line could neither be heavily fined nor retaliated against. This would permit their continued employment as key people by Respondent. The Union refused to agree to the offer. Thereafter, Bennett suggested, and the Union rejected, an agreement for an initial 1-year agency shop to be followed by the reinstitution of a union-shop provision in the second year of a 2-year contract. The Union told Respondent that it would not agree to any form of agency shop.

David Murray recalled that at that point Attorney Bennett asked whether the Union could discharge the employees who crossed the picket line and the Union responded that it could not and even gave reasons (not disclosed in this record either by direct examination or cross-examination) why it could not cause a discharge of such employees. David Murray testified that after the Union again said that the union officials would not retaliate, and would even recommend to its members that *they* take no reprisals but could not guarantee that, Bennett said that he agreed that the Union had done everything possible and that he understood and approved of the Union's action. I do not credit David Murray's further testimony that Bennett then said that the parties had "an agreement." I do, however, credit Volpe's testimony that at the June 24 meeting the Union told Respondent that, in the intervening week since the June 17 meeting, the union committee had met with the employee-members and that the members would not cause problems with reprisals against members who had crossed the picket line. This substantially corroborates David Murray's testimony that at one point Bennett said that he agreed that the Union had done everything possible and that he understood and approved of the Union's conduct with regard to gaining as much as possible from the membership with regard to an assurance and agreement against the filing of retaliatory charges by union members against those who crossed the picket line.

According to the General Counsel's witnesses, particularly David Murray, Volpe, and International Union Representative Thibodeau (who on June 24 had replaced McLellan), Bennett then said, after hearing union assurances (there would be no trouble from the union membership in filing charges against members who had crossed the picket line), that in order to help insure the protection of employees who had crossed the picket line from retaliation by individual members Respondent required the right to "pick and choose" from among the returning striking employees since some of the strikers were responsible for alleged acts of violence and intimidation against the members who had crossed the picket line. Thibodeau testified that he could not recall the latter phrase being used: that the Company wanted to pick and choose because it did not want to reinstate those responsible for violence. I do not credit Thibodeau's lack of recollection, and I conclude that such a right was linked with the question of Respondent's desire to pick and choose among employees, rejecting those whom it thought responsible for various acts of intimidation and violence. Thibodeau, in any event, denied asking Bennett why or who he wanted to pick and chose.

Volpe testified that Bennett, after hearing that the Union had met with the unit employees regarding the filing of charges, said that the parties had another problem and that Respondent wanted to pick and choose from among those strikers who returned. Volpe recalled that the Union's response was that it could never agree to that, that the meeting broke up, and that the bargainers returned to the picket line. Volpe could not recall any linkage between the alleged violence and Respondent's desire to pick and choose. As aforesaid, I find that there was a linkage mentioned by Respondent between its desire to pick and choose from among returning strikers and its appraisal of whether the strikers were engaged in acts of violence or intimidation.

3. The June 24 collective-bargaining session according to Respondent's witnesses

Hefford recalled that the Federal mediator, at the conclusion of the June 17 collective-bargaining session, stated that he saw the possibility of progress if the retaliation or "retribution" issue could be addressed. He recalled that the opening of the June 24 session concerned the question of the Company's desire for assurances protecting the employees who crossed the picket line during the strike; and that, after the Union rejected Bennett's suggestions both of an agency shop and of a secondary variation requiring a union shop following 1 year of an agency shop, Bennett said that the Union had also rejected an intermediate position taken during the period between the collective-bargaining sessions (of a $25 fine for members who had crossed the picket line) and that it now seemed to him that the Union actually did want to take retaliation against those members who had crossed the picket line during the strike. Ullrich then added that Respondent was in the business of selling bread "not people."

Hefford and Ullrich denied that any "pick and choose" statement was ever made by Respondent, that Respondent ever expressed the desire to pick and choose from among returning strikers, and that seniority among returning picketers was ever discussed; and both assert that the meeting broke up only after the Union could not give assurances to Respondent against retaliation or retribution against members who had crossed the picket line.[4]

[4] To the extent Respondent asserts (br., p. 4) that at the June 24 session Respondent stated that the issue of union reprisals against nonstriking employees who returned to work was no longer in issue, such assertion is not supported by the evidence and is rejected. Similarly rejected is Re-

Continued

Ullrich testified that the only statement remotely concerning "picking and choosing" was made at the June 17 meeting when he said that, if Respondent caught any of its employees engaging in violence or intimidation, Respondent would prosecute such employees and they would then have a hard time returning to work for Respondent.

Thus, Hefford and Ullrich denied that any "pick and choose" condition was attached to any agreement. Rather, Ullrich and Hefford testified that the June 24 collective-bargaining session broke up because and after Bennett asserted that the Union evidently desired to take retaliation against the members who had passed through the picket line and Ullrich said that Respondent sold bread and not people. They thus *deny* not only that there was a "pick and choose" condition attached by them after reaching an agreement on union retaliation (as the General Counsel's witnesses testified), but also that there was any agreement on retaliation. They testified that the June 24 session broke up only because of the Union's refusal to give assurances from its members that there would be no retaliation against the members who had passed through the picket line and worked during the strike.

4. Discussion and conclusions

The complaint (par. 13) alleges a violation of Section 8(a)(5) of the Act because Respondent, on or about June 24, 1980, demanded as conditions of agreement that (1) the Union agree not to take reprisals against union members who did not honor the picket line, and (2) Respondent be given power to choose the striking employees who would be allowed to return to work. In addition, the complaint, as amended at the hearing, alleges that the economic strike of June 10 was converted, on June 24, 1980, by Respondent's demand for the imposition of the aforesaid conditions, into an unfair labor practice strike.

At the hearing the parties appeared to take the position that in order to resolve the above issues it was necessary to first decide whether the parties had reached an agreement on an economic package, and, if so, whether such an agreement established a basis for violation of the Act if the only remaining elements at issue were the questions of a union guarantee against reprisals and alleged demand by Respondent of a right to pick and choose from among returning striking employees. The Board precedents fail to suggest that an agreement on some or all economic or other elements is necessary in order to establish an 8(a)(5) violation.

The instant case is not concerned with surface bargaining, unlawful action to forestall reaching an agreement, or alleged overall bad-faith bargaining in violation of Section 8(a)(5). Rather, it is concerned with the narrow problem of whether Respondent unlawfully insisted to "impasse" on matters which Sections 8(a)(5) and 8(d) of the Act do not permit to form the basis of an "impasse" and whether such tactic on June 24 converted the June 10 economic strike into an unfair labor practice strike upon Respondent's insistence on such conditions.

Thus, the resolution of the question of whether the parties agreed to Respondent's 30-cent-per-hour economic package or, indeed, whether the Union agreed to submit to its membership the 30-cent-per-hour package with a recommendation for acceptance (as the General Counsel suggests) or with a neutural recommendation (as Respondent argues) is not dispositive. The question to be resolved with regard to Respondent's bargaining stance is solely whether it refused to bargain within the meaning of Section 8(a)(5) of the Act by insisting on either or both of the elements alleged in paragraph 13 of the complaint, as set forth above.

If Respondent's witnesses are to be believed, Respondent's main bargaining issue and problem was its desire for, and demand to receive, assurances from the Union that there would be no retaliation against the Union's members who had passed through its picket line and worked during the strike. These assurances were of two types: (1) assurances with regard to their physical safety and (2) assurances that Respondent would neither levy fines against them nor cause them to lose union membership, nor, in any event, exercise any rights to have them discharged or retaliated against so that the employees would either quit or no longer be able to work for Respondent. Thus, Hefford and Ullrich insisted that Respondent and the Union could not agree on the Union's ability to give sufficient assurances against retaliation against the union members who had worked during the strike and continue to work for Respondent.

Since the Union denied knowledge of and responsibility for the acts of alleged violence and intimidation, and Respondent, apart from physical safety, was most concerned about (1) the filing of charges by union members which might result in fines against key personnel who might then leave Respondent's employ and (2) the power of the Union to cause key personnel to lose union membership and perhaps thereby run afoul of the contract's union-security clause (G.C. Exh. 2, art. I) requiring union membership as a condition of employment, I conclude that what caused impasse here was the Union's inability to satisfy Respondent's desires with regard to protecting its key personnel from retaliatory action by the union membership. Thus, Ullrich testified, with regard to Respondent's demand that the "key personnel" be protected, that on June 24 Attorney Bennett said that the Union's rejection of both the "agency-shop device" and the "small fine device" forced Bennett to affirmatively conclude that the Union did want to take retaliation against the members who had worked behind the picket line. Thus, after Ullrich said that Respondent sold bread and not people, the parties left and there were no further bargaining sessions or meetings.

Respondent's demand as a condition of agreement that the Union, in substance, guarantee by contract provision that its members would not take action or file charges which would result in discipline, including fines, of the members who crossed the picket line and worked (and continue to work) for Respondent, obviously related to matters of internal union affairs. The Board has clearly

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spondent's contention (br., p. 5) that impasse resulted from Respondent's insistence on a new union-security clause in the contract. Respondent, in any event, appears to admit (br., p. 19) that it insisted on a guarantee against reprisals binding on all union members as a condition of agreement. Alone, impasse on such an issue is unlawful.

held that internal union affairs are not mandatory subjects of bargaining[5] included within the terms, wages, hours, or other terms or conditions of employment. While not illegal subjects of bargaining, they are merely "nonmandatory" subjects of bargaining. *Nordstorm, Inc., supra; Fetzer Broadcasting Company*, 227 NLRB 1377, 1387 (1977). An employer may not *insist* that a union accept provisions which intrude on the disciplinary powers over its members expressly reserved to unions by the proviso to Section 8(b)(1)(A) of the Act.[6] *Independent Stave Company*, 175 NLRB 156, 159 (1969). In *Nordstorm, Inc., supra*, the Board held that a proposal that employees who crossed the picket line be granted amnesty from union discipline was a nonmandatory subject of bargaining.

Thus, if *Respondent's* witnesses' version of the basis for disagreement and the breakup of bargaining at the June 24 collective-bargaining session is credited, the parties reached disagreement, and ceased thereafter to bargain, on the Union's refusal to accede to Respondent's demand that the Union agree that there would be no union retribution from its members against the members who had crossed the picket line. Under the above cited cases, Respondent's insistence on such a clause relates to a nonmandatory subject of bargaining, and insistence to impasse, as here, on such a nonmandatory subject of bargaining violates Section 8(a)(5) of the Act.[7] As I have said above, it is immaterial whether the parties had reached agreement on other mandatory subjects of bargaining. Respondent's insistence, as a condition of agreement, upon the Union's agreeing to a nonmandatory subject of bargaining violates Section 8(a)(5) and (1) of the Act. I will recommend that Respondent cease bargaining to impasse on this, *and any other nonmandatory issue.*

It is thus, it seems to me, legally unnecessary for remedial purposes to reach or decide the further question posed by any crediting of the General Counsel's witnesses who testified that on June 24 agreement was reached on the issue of retaliation when Respondent, through Respondent's attorney, Bennett, said that the Union's efforts in having its members not make charges against the members who had passed through the picket line, although not a guarantee, were understood by Bennett and acceptable by him. They also testified that Bennett said that there was a further problem, however, in that Respondent insisted on the right to pick and choose from among the remaining striking employees for the existing jobs in their return to work.

Insistence to impasse on such a right would violate Section 8(a)(5) of the Act since many, if not most, of the strikers apparently had not been permanently replaced as of June 24 and were unfair labor practice strikers. While the issue of reinstatement of economic strikers may be a mandatory subject of bargaining (*Nordstrom, Inc., supra* at 610, fn. 16, citing *Pepsi-Cola Bottling Co. of Miami, Inc.*, 186 NLRB 477 (1970); *Midwestern Instruments, Inc.*, 133 NLRB 1132, 1141 (1961)), here some of the strikers appear to be unfair labor practice strikers. If an agreement to treat unfair labor practice strikers as economic strikers for purposes of reinstatement is of no effect and is in derogation of the strikers' rights and contravenes Board policies (*Nordstrom, Inc., supra; Wooster Division of Borg-Warner Corp.*, 121 NLRB 1492, 1495 (1958)), then an employer's demand to impasse that it be accorded the right unilaterally to decide whom to reinstate from among unfair labor practice strikers would be insisting on a right the Union may not give; i.e., an unlawful condition under *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp., supra.* Insistence to impasse on such a demand would violate Section 8(a)(1) and (5) of the Act.

As above noted, however, I need not reach or decide this issue since the remedy would be the same if agreement were reached on the issue of union retaliation but a new impasse occurred on Respondent's alleged demand of unilateral power to pick and choose among returning strikers.

F. *The Strike as of June 24, 1980*

As above noted, I regard as immaterial and, in any case, not dispositive the resolution of the question whether the parties had reached agreement on many or, indeed, all other subjects of bargaining on June 24. The issue with regard to the conversion of the admitted June 10 economic strike into an unfair labor practice strike on June 24 is whether unfair labor practices on June 24 precipitated, in whole or in part, the continuation of the strike. Again, it is not a question of whether there were open issues involving mandatory subjects of bargaining which remained unsettled; rather, the issue is whether Respondent's insistence upon nonmandatory (or unlawful) subjects of bargaining, in whole or in part, caused the continuation of the strike. *Tufts Brothers, Inc.*, 235 NLRB 808, 810 (1978). While it might be argued that there was no agreement on the economic package, there is no question that the economic package appeared on its way to resolution and, indeed, would have been submitted to the unit by the union representatives (according to Respondent's witnesses, without the union's recommendation, by a secret-ballot vote, which procedure was satisfactory to Respondent). What caused the breakup of the June 24 collective-bargaining session and the continuation of the strike was Respondent's insistence (on the

[5] Mandatory subjects of bargaining (*Nordstorm, Inc.*, 229 NLRB 601, 609 (1977), citing *International Union of Operating Engineers, Local Union No. 12 (Associated General Contractors of America, Inc., etc.)*, 187 NLRB 430, 432 (1970)) "are those comprised in the phrase 'wages, hours, and other terms and conditions of employment' as set forth in Section 8(d) of the Act. While the language is broad, parameters have been established, although not quantified. The touchstone is whether . . . the proposed clause sets a term or condition of employment or regulates the relation between the employer and its employees." Cf. *First National Maintenance Corp.* v. *N.L.R.B.*, 452 U.S. 666 (1981).

[6] The proviso to Sec. 8(b)(1)(A) states: "[T]his paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein."

[7] The Supreme Court, in *N.L.R.B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958), cited in *Nordstrom, Inc., supra.* at 609:

> [G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining . . . . [S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects . . . . *But it does not follow that, because the company may propose these [nonmandatory] clauses, it can lawfully insist upon them as a condition to any agreement.* [Emphasis supplied.]

evidence adduced from its own witnesses) on the Union's agreeing, as a condition to overall agreement, to have its members not seek or engage in any disciplinary acts or charges against the members who worked, and continue to work, for Respondent during the strike and who had passed through the picket line. I have concluded that such insistence was unlawful within the meaning of Section 8(a)(5) since Respondent was insisting to impasse on a mere permissible bargaining subject (*N.L.R.B.* v. *Wooster Division of Borg-Warner Corp., supra* at 350; *Nordstrom, Inc., supra* at 609; *Independent Stave Co., supra* at 159); and I further conclude that Respondent's insistence to impasse on this nonmandatory subject of bargaining was the predominant, if not the entire, cause of the continuation of the 15 strike on and after June 24, 1980. *N.L.R.B.* v. *Laredo Coca Cola Bottling Company*, 613 F.2d 1338 (5th Cir. 1980); *Latrobe Steel Company*, 244 NLRB 528 (1979). Again, I would reach the same conclusion if the General Counsel's witnesses were credited: that the collective-bargaining session of June 24 failed because of Respondent's insistence to impasse on a right to pick and choose among the striking employees (who, after June 24, were unfair labor practice strikers) concerning their return to jobs with Respondent. *Nordstrom, Inc., supra* at 609, citing *Wooster Division of Borg-Warner Corp., supra* at 1495. I might note, in passing, that regardless of whether the right to pick and choose from among returning *economic* strikers is a mandatory subject of bargaining (especially including the method and means by which they are returned to jobs), where the number of jobs available is less than the number of outstanding striking employees (cf. *Nelson Filter, a Division of Nelson Industries, Inc.*, 255 NLRB 131 (1981); *United Aircraft Corporation (Pratt and Whitney Division)*, 192 NLRB 382 (1971)), what respondent here was insisting upon was not an agreement and schedule with regard to picking and choosing and was not bargaining towards such an agreement, but was (to impasse) the unilateral right to do so. Such a position, not bargaining, would from the outset arrogate to Respondent the sole right to pick and choose from among striking employees. Such conduct would be the arrogation to itself of the power concerning a subject (return of striking employees to their jobs) which the Union was vitally involved in. Such conduct, as I have suggested, likewise would have violated Section 8(a)(5) of the Act if the issue were actually reached.

CONCLUSIONS OF LAW

1. Respondent Cote Bros. Bakery, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling employees engaged in an economic strike, or or about June 10 or 11, 1980, that they were "through" if they did not return to work and abandon the strike, Respondent violated Section 8(a)(1) of the Act.

4. By insisting to impasse on a nonmandatory subject of bargaining on June 24, 1980, Respondent violated Section 8(a)(5) of the Act.

5. By unlawfully insisting to impasse, on June 24, 1980, on a nonmandatory subject of bargaining, Respondent thereby and then converted the economic strike, which commenced on June 10, 1980, into an unfair labor practice strike.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

The General Counsel concedes that there is no monetary loss involved in this case. The parties agree that the strike, which originated on June 10, 1980, is still in progress and that the Union and the striking employees, as of the time of the hearing, have failed to offer unconditionally to return to their jobs.

Having found that Respondent is engaged in certain unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, Respondent will be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The remedies herein will relate, *inter alia*, to the employees engaged in an economic strike from June 10 through June 23, 1980. With regard to the period June 10 through June 23, 1980, the record is unclear concerning how many employees crossed the picket line and returned to work, when and for which jobs permanent replacements were hired, how many jobs remained available for the strikers in the period ending June 23, 1980, and which, if any, jobs were abolished. The determination of such matters is better left to the compliance stage of the proceeding. *Marlene Industries Corporation, et al.*, 255 NLRB 1446 (1981). In any event, the rights of the economic strikers whose jobs were filled by permanent replacements between June 10 and 23 are governed by the Board's rule in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). In restating the *Laidlaw* rule, in *Giddings & Lewis, Inc.*, 255 NLRB 742 (1981), the Board declared that economic strikers who unconditionally apply for reinstatement are to be reinstated; but, when their positions are filled by permanent replacements, they are entitled to full reinstatement either upon the departure of the permanent replacements or when jobs for which they are otherwise qualified become available (*Flatiron Paving Company, d/b/a Flatiron Materials Company*, 250 NLRB 554 (1980)), unless they have in the meantime acquired other regular and substantially equivalent employment or the employer can sustain its burden of proof that the failure to offer reinstatement was for legitimate and substantial business reasons. It will therefore be recommended that, upon these economic strikers' or the Union's (in their behalf) making an unconditional offer to return to their old jobs, Respondent offer them their old jobs; but to such strikers whose jobs were permanently filled on or prior to June 23, 1980, their rights to jobs in the bakery will be subject to the above rights, conditions, and limitations.

With regard to the striking employees whose jobs were not filled by permanent replacements on and before June 23, 1980, or whose jobs were not abolished in that period, or, in any case, where jobs for which they are qualified have become available after any such permanent replacement or abolition, I will recommend that their rights be governed by the rules relating to the reinstatement of unfair labor practice strikers. Cf. *Nelson Filter, a Division of Nelson Industries, Inc., supra; Latrobe Steel Co., supra.* Thus, any permanent replacements hired on and after June 24, 1980, or any new hires for jobs which were opened commencing on that date for which the strikers were qualified, must be dismissed for the benefit of any striker who makes an unconditional offer for reinstatement to his old job which job, as above noted, was not filled before June 24, 1980, when the economic strike ceased. Thus, I shall recommend to the Board that, upon the Union's or the employees' offer unconditionally to abandon the strike and return to their old jobs, Respondent shall reinstate and recall the formerly striking employees to their old jobs, or to vacancies in jobs for which the strikers are qualified, dismissing, if necessary, any employees incumbent in those jobs who were hired on or after June 24, 1980.

The Board's rule also requires that unfair labor practice strikers be made whole for any loss of earnings they may have suffered as a result of Respondent's refusal, if any, to reinstate them in a timely fashion by paying to each of them that which he would have earned as wages in the period commencing 5 days after the date on which each unconditionally offers to return to work to the date of Respondent's offer of reinstatement, less any net earnings during such period, said backpay to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

The Board's further rule is that if Respondent has already rejected, or hereafter rejects, unduly delays, or ignores, any unconditional offer by employees to return to work, or attaches unlawful conditions to its offer of reinstatement, the above 5-day period serves no useful purpose, and backpay will commence as of the unconditional offer to return to work. *Newport News Shipbuilding and Dry Dock Company*, 236 NLRB 1637 (1978).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Cote Bros. Bakery, Inc., Manchester, New Hampshire, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening its employees with discharge by telling them that they are "through" if they do not return to work and abandon a lawful economic strike.

(b) Refusing to bargain in good faith with Local 348, Bakery, Confectionery and Tobacco Workers International Union of America, AFL-CIO, by insisting to bargaining impasse upon amnesty from union discipline for employees who are members of the Union who crossed the Union's picket line and worked during a lawful strike, or upon any other nonmandatory subject of bargaining, in the following appropriate unit:

> Bakery Production Department, Porters, Plant Maintenance and Shipping Departments, excluding Executives, office and clerical employees, guards, professional employees, and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively in good faith with the Union, as the exclusive collective-bargaining representative of all its employees in the above-noted appropriate unit, with respect to wages, hours, and other terms and conditions of employment, and embody any understanding reached in a signed agreement.

(b) Upon their unconditional offer to return to work, reinstate the strikers to their old jobs, dismissing, if necessary, any replacements hired in their place, except where such replacements occurred before June 24, 1980, and make them whole for any loss of earnings that they may incur in the manner set forth in the section of this Decision entitled "The Remedy." Striking employees who were permanently replaced or whose jobs were abolished before June 24, 1980, shall be offered jobs when and if the permanent replacements leave, or when positions become available for which they are qualified.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, seniority records, timecards, collective-bargaining agreements, personnel records and reports, and all other records necessary to analyze the basis for the reinstatement of economic and unfair labor practice strikers and the amount of backpay, if any, due under the terms of this recommended Order.

(d) Post at its plant at 87 Elm Street, Manchester, New Hampshire, copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days

[8] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations of the Act not specifically found herein.[10]

[10] Bearing the date of June 26, 1981, Respondent filed a post-trial motion, supported by an annexed affidavit of the same date (herein ALJ Exh. 1) by its attorney, Peter R. Kraft, Esq., to dismiss the consolidated complaint on the grounds that, effective June 13, 1981 (subsequent to the close of the record herein), Respondent's assets have been taken over and are being liquidated by Indian Head National Bank of Nashua, New Hampshire; Respondent has apparently ceased operations and will not resume operations; Respondent's employees were terminated effective June 13, 1981, without any possibility of returning to their former jobs; no meaningful remedy can now be granted; and further proceedings would be vain, costly, and contrary to the purpose of the Act and the powers of the Board.

Respondent's motion is hereby denied. The matters alleged in the motion and affidavit are not part of the record in this case, as defined by Sec. 102.45(b) of the Board's Rules and Regulations, Series 8, as amended, and are not properly before me. Moreover, the issues raised by Respondent's allegations are for the compliance stage of this proceeding. See *S. Freedman Electric, Inc.*, 256 NLRB 432, fn. 1 (1981).